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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

A.B. and S.B., Minors, by and through
Erin K. Olson, their Conservator, and
D.L.,

Plaintiffs,

v.

ANDREW FRANKLIN KOWALCZYK,

Defendant.

Case No. 3:19-cv-1521-MO

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S EMERGENCY
MOTION TO CONTINUE OR STAY**

Plaintiffs respond as follows to defendant's "Emergency Motion to Continue or Stay Notice of Denial to Access to Courts. Declaration in Support," filed February 21, 2020 (Dkt. No. 23).

RELEVANT TIMELINE

The docket reflects the following relevant timeline:

- 9/20/2019: Plaintiffs filed their Complaint. (Dkt. No. 1)
- 10/03/2019: Defendant was served with the Summons, Complaint, and other initial documents. (Dkt. No. 5)
- 10/20/2019: Plaintiffs filed their Motion for Summary Judgment. (Dkt. No. 7)
- 12/09/2019: The Court ordered Plaintiffs to show cause how they would like to proceed with this case within 14 days or the case may be dismissed for lack of prosecution. (Dkt. No. 12)
- 12/20/2019: Plaintiffs filed their Motion for Entry of Default. (Dkt. No. 13)
- 12/20/2019: Defendant filed a “Motion to Continue, Objection to Entry of Summary Judgment, etc.” (Dkt. No. 15)
- 01/08/2020: The Court ordered as follows:
- “Defendant's Motion to Continue [15](#) is GRANTED in part and DENIED in part. Defendant has 45 days from the date of this order to answer Plaintiff's Complaint [1](#) or to give the court evidence of the alleged lack of service. If Defendant does not respond within 45 days (2/24/2020), the court will construe his Motion to Continue [15](#) as an answer. Defendant's request for discovery is DENIED with leave to renew. The discovery period closes 1/21/2020, and Defendant may file any discovery request upon Plaintiff until that time. If Defendant requires more time, he may renew his request in a separate motion. The briefing schedule for Plaintiff's Motion for Summary Judgment [7](#) is STAYED until after Defendant files an answer. The court ORDERS the clerks office to mail this order to Defendant at Tuscon USP, in light of the Mail Returned-Undeliverable [19](#) filed on 1/7/2020. Defendant is no longer housed at FCI Sheridan.” (Dkt. No. 20)
- 02/21/2020: Defendant filed the "Emergency Motion to Continue or Stay, Notice of Denial to Access to Courts, Declaration in Support Motions.” (Dkt. No. 23)

ARGUMENT

In its January 8, 2020 Order, the Court gave Defendant “45 days from the date of this order to answer Plaintiff's Complaint or to give the court evidence of the alleged lack of service.” (Dkt. No. 20)

Defendant's February 21, 2020 filing is in the form of a combined declaration/motion, not an answer. The only "evidence of the alleged lack of service" is on p. 2 of the Defendant's filing, and states, "There are records from Sheridan that show I was on Suicide watch and the complaint/summons impossible to serve on me." (Dkt. No. 23, p. 2) Defendant goes on to "move to dispose [*sic*] the process server and officers at Sheridan involved." (*Id.*)

In this circuit, "a signed return of service constitutes prima facie evidence of valid service which can be overcome only by strong and convincing evidence." *SEC v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007). To the extent Defendant claims by his above-quoted statement that he was not served, he has not met his burden.

Lest there be any doubt that Defendant was personally served with the Summons and Complaint, the "Declaration of Tammy Runyon," the process server, is filed with this response.

Defendant should not be given more time to file an answer, and this Court should do as it stated it would do in its January 8, 2020 Order, and construe Defendant's "Motion to Continue" (Dkt. No. 15) as his answer. The Court should thereafter decide plaintiffs' motion for summary judgment, filed more than four months ago.

DATED this 2nd day of March, 2020.

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/s/ Josh Lamborn

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true copy of the foregoing document and its supporting “Declaration of Tammy Runyon” on the defendant by prepaid, first-class mail, addressed as follows:

Andrew Franklin Kowalczyk, USM No. 39532-086
USP-Tucson
9300 S. Wilmot Road
Tucson, AZ 85756

Dated: March 2, 2020.

/s/ Josh Lamborn

Josh Lamborn